No. 80-100

In the Supreme Court of the United States

October Term, 1980

Supreme Court, U. S.
FILED
AUG 22 1980
MICHAEL RODAK, JR., CLERK

THE LORAIN JOURNAL COMPANY, THE NEWS-HERALD, and J. THEODORE DIA[illegible],
Petitioners,

vs.

MICHAEL MILKOVICH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Motion for Leave to File a Brief As Amici Curiae by The Beacon Journal Publishing Company; Chillicothe Gazette; The Cincinnati Enquirer; The Cincinnati Post; The Cleveland Press; The Columbus Citizen-Journal; The Dispatch Printing Company; The Dix Newspapers; The Independent (Massillon); Lorain County Printing & Publishing Company; The Marietta Times; News-Herald (Port Clinton); News-Messenger (Fremont); The Niles Daily Times; The Plain Dealer (Cleveland); The Repository (Canton); The Toledo Blade Company; The Tribune Company and The Vindicator Printing Company; and Brief in Support of the Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio

BRUCE W. SANFORD
818 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 861-1500
Attorney for Amici

Of Counsel:
JAMES P. GARNER
DON H. PACE
WENDY J. GIBSON
BAKER & HOSTETLER
3200 National City Center
Cleveland, Ohio 44114
(216) 621-0200

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

Table of Authorities II

Motion for Leave I

Brief Amici Curiae:

Interest of Amici Curiae 1

Summary of Argument 5

Argument 6

I. The Decision of the Ohio Court Creates an Intolerable Chilling Effect on the Reporting of Judicial Proceedings 6

II. The Decision of the Ohio Court Should Be Reviewed Because It Conflicts with Constitutional Determinations of the United States Supreme Court 10

A. The Ohio Court Unconstitutionally Creates a Conclusive Presumption that Statements which Differ from Judicial Findings Are False 10

B. The Ohio Court Unconstitutionally Strips Critics of Judicial Findings of Their Rights to Judicial Scrutiny of the Sufficiency of Evidence in Libel Actions 13

Conclusion 16

Appendix:

Letter of Petitioners Granting Leave to File Brief Amici Curiae 17

TABLE OF AUTHORITIES

Cases

Abrams v. United States, 250 U.S. 616 (1919) 8
Associated Press v. Walker, 388 U.S. 130 (1967) 14
Bailey v. Alabama, 219 U.S. 219 (1911) 11
Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967) 15
Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 13
Bridges v. California, 314 U.S. 252 (1941) 12
Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1972) 8
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 5, 6
Craig v. Harney, 331 U.S. 367 (1947) 12
Gannett Co. v. De Pasquale, 443 U.S. 368 (1979) 5
Garrison v. Louisiana, 379 U.S. 64 (1964) 11, 12
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 7, 8, 14
Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970) 15
Hansberry v. Lee, 311 U.S. 32 (1940) 13
Herbert v. Lando, 441 U.S. 153 (1979) 11
Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) 5
Linda R.S. v. Richard D., 410 U.S. 614 (1973) 9
Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947 (D.D.C. 1976) 15
McNees v. Cincinnati Street Ry. Co., 152 Ohio St. 269, 89 N.E.2d 138 (1949) 7
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 15
Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) 14
Nebraska Press Ass'n v. Stuart, 423 U.S. 1327 (1975) 9

Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) 5, 9
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 7, 8, 10-11, 12, 13-14, 15
Orr v. Argus-Press Co., 586 F.2d 1108 (6th Cir. 1978), *cert. den.* 440 U.S. 960 (1979) 14
Parklane Hosiery v. Shore, 439 U.S. 322 (1979) 13
Pilkington v. Saas, 25 Ohio L. Abs. 663 (Ct. App. 1937) 6
Posin v. A.B.C. Motor Court Hotel, Inc., 45 Ohio St.2d 271, 344 N.E.2d 334 (1976) 7
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 8
Richmond Newspapers, Inc. v. Virginia, No. 79-243 (U.S. slip op. July 2, 1980) 5, 13
St. Amant v. Thompson, 390 U.S. 727 (1968) 15
Schultz v. Reader's Digest Ass'n, 468 F. Supp 551 (E.D. Mich. 1979) 6
Shallenberger v. E. W. Scripps Publishing Co., 8 Ohio N.P. (n.s.) 633 (C.P.), *aff'd* 32 Cir. Dec. 283 (Ct. App. 1909) 8
Smith v. California, 361 U.S. 147 (1959) 7
Speiser v. Randall, 357 U.S. 513 (1958) 7
State of Ohio v. James V. Barbuto, No. 80-4-432 (Ohio C.P., Summit Co., sentence handed down Aug. 8, 1980) 8-9
State of Ohio v. James V. Barbuto, No. 80-5-577 (Ohio C.P., Summit Co., sentence handed down Aug. 8, 1980) 8-9
Time, Inc. v. Pape, 401 U.S. 279 (1971) 10, 15
Vandenberg v. Newsweek, Inc., 507 F.2d 1024 (5th Cir. 1975) 15
West v. American Telephone and Telegraph Co., 311 U.S. 223 (1940) 6
Westropp v. E. W. Scripps Co., 148 Ohio St. 365, 74 N.E.2d 340 (1947) 8

Constitutions

U.S. Constitution

Amendment I ..... *passim*

Amendment XIV ..... *passim*

Law Reviews

Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281 (1957) 13

Stephenson, *Thorns In Their Sides: Courts and Their Critics in Florida*, 4 FLA. ST. U. L. REV. 449 (1976) 9

Constitutional Law - Defamation - The New York Times *Standard and Reports of Judicial Proceedings*, 37 OHIO ST. L. J. 881 (1976) 5

Public Access to Pretrial Criminal Hearings: The Use of Closure Orders After Gannett v. De Pasquale, 44 ALBANY L. REV. 455 (1980) 9

Other (Periodicals)

Graham, *The Secret Trial of John Connally*, THE NEW REPUBLIC, June 21, 1975, at 7 10

Treatises

14 O. JUR. 2d *Courts* § 220 (1955) 6

No. 80-100

In the Supreme Court of the United States

October Term, 1980

THE LORAIN JOURNAL COMPANY, THE NEWS-HERALD, and J. THEODORE DIADIUN,
Petitioners,

vs.

MICHAEL MILKOVICH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Motion for Leave to File a Brief As Amici Curiae by The Beacon Journal Publishing Company; Chillicothe Gazette; The Cincinnati Enquirer; The Cincinnati Post; The Cleveland Press; The Columbus Citizen-Journal; The Dispatch Printing Company; The Dix Newspapers; The Independent (Massillon); Lorain County Printing & Publishing Company; The Marietta Times; News-Herald (Port Clinton); News-Messenger (Fremont); The Niles Daily Times; The Plain Dealer (Cleveland); The Repository (Canton); The Toledo Blade Company; The Tribune Company and The Vindicator Printing Company

The publishers of 25 newspapers in the State of Ohio, namely, *Akron Beacon Journal, Alliance Review, The Blade* (Toledo), *Chillicothe Gazette, The Chronicle-Telegram* (Elyria), *The Cincinnati Enquirer, The Cincinnati Post, The Cleveland Press, The Columbus Citizen-Journal, The Columbus Dispatch, The Crescent-News* (Defiance), *The Daily Jeffersonian* (Cambridge), *The Daily Record* (Wooster), *The Independent* (Massillon), *The Marietta*

Times, News-Herald (Port Clinton), *News-Messenger* (Fremont), *The Niles Daily Times, The Plain Dealer* (Cleveland), *The Record Courier* (Ravenna-Kent), *The Repository* (Canton), *The Times-Gazette, The Times Leader* (Martins Ferry—Bellaire), *The Tribune Chronicle* (Warren), and *Youngstown Vindicator,* join together to move the Court for leave to file a brief as *amici curiae* in support of the Petition for a Writ of Certiorari in this case. The consent of the petitioners, The Lorain Journal Company, *The News-Herald* and J. Theodore Diadiun, has been obtained. The consent of the respondent, Michael Milkovich, has been requested and refused. As publishers of newspapers of general circulation in Ohio, movants believe that their ability to serve the public has been greatly encumbered by the decision below.

Movants believe that their brief as *amici curiae* will aid this Court by (1) clarifying the impact of the Court of Appeals decision on publishing in Ohio; (2) describing, from movants' own experiences, how this case, if it stands, will inhibit reporting and comment on the administration of justice in Ohio; and, (3) elucidating why the case's inconsistency with well-established tenets of constitutional libel law militates toward a review by this Court.

Accordingly, movants respectfully request this Court to grant leave to file their accompanying Brief in Support of the Petition for a Writ of Certiorari.

Respectfully submitted,

BRUCE W. SANFORD
818 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 861-1500
Attorney for Amici

No. 80-100

In the Supreme Court of the United States

October Term, 1980

THE LORAIN JOURNAL COMPANY, THE NEWS-HERALD, and J. THEODORE DIADIUN,
Petitioners,

vs.

MICHAEL MILKOVICH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Brief As Amici Curiae of The Beacon Journal Publishing Company; Chillicothe Gazette; The Cincinnati Enquirer; The Cincinnati Post; The Cleveland Press; The Columbus Citizen-Journal; The Dispatch Printing Company; The Dix Newspapers; The Independent (Massillon); Lorain County Printing & Publishing Company; The Marietta Times; News-Herald (Port Clinton); News-Messenger (Fremont); The Niles Daily Times; The Plain Dealer (Cleveland); The Repository (Canton); The Toledo Blade Company; The Tribune Company and The Vindicator Printing Company; in Support of the Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio

---

INTEREST OF AMICI CURIAE

Amici are publishers of 25 newspapers of general circulation within the State of Ohio. They furnish the public with news and commentary on matters of importance

to a democracy, including, frequently, reports on civil or criminal proceedings in the judicial branch of government.

Located throughout Ohio from small towns to the largest cities, they represent a group uncommonly broad and diverse in terms of their sizes, resources and editorial viewpoints. Their combined circulation exceeds two million each weekday through publication of the following newspapers:

Akron Beacon Journal (daily circulation of approximately 162,000), published by The Beacon Journal Publishing Co. in Akron, Ohio.

The Blade (daily circulation of approximately 170,000), published by The Toledo Blade Co. in Toledo, Ohio.

Chillicothe Gazette (daily circulation of approximately 17,000), published by Gannett Co., Inc. in Chillicothe, Ohio.

The Chronicle-Telegram (daily circulation of approximately 40,000), published by Lorain County Printing & Publishing Co. in Elyria, Ohio.

The Cincinnati Enquirer (daily circulation of approximately 187,000), published by Gannett Co., Inc. in Cincinnati, Ohio.

The Cincinnati Post (daily circulation of approximately 150,000), published by The E. W. Scripps Co. in Cincinnati, Ohio.

The Cleveland Press (daily circulation of approximately 301,000, a significant part of which is distributed within the counties of the Eleventh Judicial District of Ohio), published by The E. W. Scripps Co. in Cleveland, Ohio.

The Columbus Citizen-Journal (daily circulation of approximately 115,000), published by The E. W. Scripps Co. in Columbus, Ohio.

The Columbus Dispatch (daily circulation of approximately 202,000), published by The Dispatch Printing Co. in Columbus, Ohio.

Seven daily newspapers published by The Dix Newspapers:

Alliance Review (Alliance, circulation of approximately 14,000).

The Crescent-News (Defiance, circulation of approximately 18,000).

The Daily Jeffersonian (Cambridge, circulation of approximately 15,000).

The Daily Record (Wooster, circulation of approximately 28,000).

The Record Courier (Ravenna-Kent, circulation of approximately 26,000).

The Times-Gazette (Ashland, circulation of approximately 13,000).

The Times-Leader (Martins Ferry—Bellaire, circulation of approximately 24,000).

The Independent (daily circulation of approximately 18,000), published by Massillon Newspapers, Inc. in Massillon, Ohio.

The Marietta Times (daily circulation of approximately 15,000), published by Gannett Co., Inc. in Elyria, Ohio.

News-Herald (daily circulation of approximately 6,000), published by Gannett Co., Inc. in Port Clinton, Ohio.

News-Messenger (daily circulation of approximately 16,000), published by Gannett Co., Inc. in Fremont, Ohio.

The Niles Daily Times (daily circulation of approximately 6,000, a substantial part of which is distributed within the counties of the Eleventh Judicial District of Ohio), published by Phoenix Publications Inc. in Niles, Ohio.

The Plain Dealer (daily circulation of approximately 393,000, a significant part of which is distributed within the counties of the Eleventh Judicial District of Ohio), published by The Plain Dealer Publishing Co. in Cleveland, Ohio.

The Repository (daily circulation of approximately 66,000), published by Thomson Newspapers Inc. in Canton, Ohio.

The Tribune Chronicle (daily circulation of approximately 45,000, almost all of which is distributed within the counties of the Eleventh Judicial District of Ohio), published by The Tribune Co. in Warren, Ohio.

Youngstown Vindicator (daily circulation of approximately 103,000, a significant part of which is distributed within the counties of the Eleventh Judicial District of Ohio), published by The Vindicator Printing Co. in Youngstown, Ohio.

If the decision of the Ohio Court of Appeals for the Eleventh District is permitted to stand, all these *amici* will be adversely affected in their ability to inform the citizens of Ohio about the administration of justice.

SUMMARY OF ARGUMENT

The decision of the Ohio Court of Appeals, Eleventh District, should be reviewed because it will severely restrict the free flow of information about judicial proceedings and the administration of justice in Ohio.

The decision below rules that in libel cases brought by public officials or public figures, the issue of "actual malice" must be decided by a jury whenever the defendant's statement differs from a judicial finding. The case truncates centuries of common law and almost two decades of constitutional law to fashion new libel law for Ohio of awesomely intimidating proportions. *Amici* view this mutation as denying them, when a published statement takes issue with a court's finding, at least three fundamental constitutional protections afforded to libel defendants: (1) the defense of truth, (2) the defense that the statement is a non-actionable opinion, and (3) the procedural right to have the constitutional sufficiency of evidence of "actual malice" determined by a court as a matter of law.

Accordingly, *amici* seek the review and relief of this Court not merely for the public's right to receive information about what transpires in its courts,[1] but also to rebut the astonishing suggestion of the decision below—that the judiciary may constitutionally determine what opinions the public may safely express.

---

1. *See Richmond Newspapers, Inc. v. Virginia*, No. 79-243, slip op. of Mr. Chief Justice Burger at 18-19 (U.S., July 2, 1980); *Gannett Co. v. De Pasquale*, 443 U.S. 368, 413 n.2 (1979) (Blackmun, J., concurring in part and dissenting in part); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975). *See generally Constitutional Law - Defamation - The* New York Times *Standard and Reports of Judicial Proceedings*, 37 OHIO ST. L. J. 881 (1976).

ARGUMENT

I. The Decision of the Ohio Court Creates an Intolerable Chilling Effect on the Reporting of Judicial Proceedings.

The decision of the Ohio Court of Appeals, Eleventh District, will severely stifle news reporting and commentary on judicial affairs throughout Ohio.[2] This Court has stressed the importance of accepting review in such cases where "a failure to decide the question now will leave the press in [the State] operating in the shadow . . . of a rule of law . . . the constitutionality of which is in serious doubt. . . ." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 486.

As demonstrated in the Petition for a Writ of Certiorari,[3] the decision below has three principal impacts on libel cases in Ohio: (1) it conclusively presumes the falsity of any statement that differs from a court's finding, regardless of whether the speaker had any involvement in the court case producing such finding, (2) it discards constitutional protection afforded to statements of opinion, whenever they might be deemed to differ from a court's finding, and (3) it concocts a *per se* rule that warns a speaker that he may contradict a court's finding only at

---

2. Decisions of a Court of Appeal in Ohio are highly persuasive authority throughout the state, as well as binding within the counties of the particular judicial district. *Pilkington v. Saas*, 25 Ohio L. Abs. 663, 667 (Ohio App. 1937), 14 O. JUR. 2d *Courts* §220 (1955). They are also persuasive authority for federal courts applying Ohio law. *Schultz v. Reader's Digest Ass'n*, 468 F. Supp. 551, 561 (E.D. Mich. 1979), citing *West v. American Telephone and Telegraph Co.*, 311 U.S. 223 (1940).

3. *Amici* specifically endorse all arguments made in the Petition but do not repeat them here unless warranted for clarity's sake.

the peril of a complete libel trial, void of the procedural safeguards which ensure that a jury verdict is supported by the constitutionally requisite "clear and convincing" evidence of actual malice.[4] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

The effect of this decision on newspapers considering whether to publish a statement or opinion contrary to a court's finding could be at once insidious and pervasive. If the publication is deemed libelous, the newspaper could not avoid the disruption and expense of a full libel trial. Moreover, it would be precluded at trial from establishing the truth of its statement, and could not successfully contest as a matter of law an unsupported jury finding of "actual malice." Inevitably, some will choose, as this Court has recognized, to " 'steer far wider of the unlawful zone' ". *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964), quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958). And, to the extent that self-censorship occurs, the decision below effectively undermines the entire premise for this Court's addition of a constitutional dimension to libel law in the United States—the realization that the public is deprived of essential information about its government by rules which impose strict liability. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 340. As this Court noted, quoting *Smith v. California*, 361 U.S. 147, 153-154 (1959):

> " '[T]imidity in the face of . . . liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally

---

4. Although the decision below was technically concerned with whether a directed verdict in favor of defendants was proper, Ohio decisions have established that in Ohio, as in the federal courts, the standards for the granting of a directed verdict are the same as those for granting a judgment n.o.v. *Posin v. A.B.C. Motor Court Hotel, Inc.*, 45 Ohio St. 2d 271, 275, 344 N.E.2d 334 (1976); *McNeese v. Cincinnati Street Ry. Co.*, 152 Ohio St. 269, 269, 89 N.E.2d 138 (1949). Thus, a decision overturning a directed verdict is, in effect, a decision that a contrary jury verdict on such evidence would be proper.

suppress directly. . . . [S]elf-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered.' " *New Orleans Times Co. v. Sullivan*, 376 U.S. at 278-79.[5]

The sweep of the decision below commands editors to scrutinize virtually all coverage of matters before courts for possible collision with a court's finding. Newspapers can question whether a criminal defendant has been wrongfully exonerated or convicted, whether witnesses have told the truth, or whether judges, prosecutors or attorneys have acted properly, only at their peril. For the consequence, if the statement or comment is deemed defamatory, is a libel trial with greatly attenuated constitutional safeguards as envisioned by the court below.[6]

---

5. Such self-censorship is damaging because it diminishes the stock of ideas and opinions upon which the public can draw, thus hampering the ability of the people to engage in that " 'uninhibited, robust, and wide-open' " debate on public affairs which is at the core of the First Amendment. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 339-40, quoting *New York Times Co. v. Sullivan*, 376 U.S. at 270. This Court has repeatedly recognized that the popular perception of the validity of ideas is continually subject to change. The ability of the people to govern themselves wisely is therefore best promoted by preserving an "uninhibited marketplace of ideas" which permits opinions to be tried against the broadest possible spectrum of competing thoughts. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). *See also* Justice Holmes' dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919), and dissent of Brennan, J. in *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 184-192 (1972).

6. Theoretically, the decision below could even be utilized by a judge bringing a libel action against a newspaper for criticism of his judicial determination. The judge's own determination would deny the defense of truth to the newspaper. This is not an especially unlikely scenario since judges in Ohio, as elsewhere, have been known to sue for libel, *e.g.*, *Westropp v. E. W. Scripps Co.*, 148 Ohio St. 365, 74 N.E.2d 340 (1947); *Shallenberger v. E. W. Scripps Publishing Co.*, 8 Ohio N.P. (n.s.) 633 (C.P.), *aff'd* 32 Cir. Dec. 283 (Ct. App. 1909), and have been convicted of wrongdoing in the performance of their duties. *See, e.g.*, for a recent example, *State of Ohio v. James V. Barbuto*, Case Nos. 80-5-577 and 80-4-432 (Summit Co., Ohio, Common

(Continued on following page)

Other prepublication dilemmas would present themselves. When a newspaper discovered new evidence suggesting perjury or, worse, that the wrong person had been convicted of a crime, it would have to weigh the risks of defending a libel trial against its obligation to the public. Even the most courageous editor would be sobered by the realization that in a libel trial, the newspaper would be helpless to contest the prior conviction which would establish the "truth" against it.[7] The same sort of choice would face a reporter who, as in the instant case, sought to give the public his own first-hand information or perspective about underlying facts in a civil suit.

Perhaps the greatest impediment to the public's right to receive information about judicial proceedings may emerge, if the decision below stands, when newspapers are inhibited from publishing reports about events unresolved by litigation. While covering a pending lawsuit, for example, a newspaper could not safely comment on a witness' testimony which the newspaper had reason to believe was false. Only by waiting until the veracity of the witness was determined by a court could the newspaper publish without fear that the "truth" would be established by the court contrary to its report.[8] Similarly, a news-

---

Footnote continued—

Pleas Court, sentence handed down Aug. 8, 1980) (judge of probate court convicted of dereliction of duty, intimidation, and gross sexual imposition). *See generally*, Stephenson, *Thorns In Their Sides: Courts and Their Critics in Florida*, 4 FLA. ST. U. L. REV. 449 (1976) for a historical account of clashes between the judiciary and the press in that state.

7. The newspaper, of course, would have no standing to appeal another's prior criminal conviction directly. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).

8. First Amendment freedoms are squelched as surely by delay as by suppression for all time. *Nebraska Press Association v. Stuart*, 423 U.S. 1327, 1329 (1975) (In-chambers opinion of Blackmun, J.); *Nebraska Press Association v. Stuart*, 427 U.S. 539, 560-61, 606, 609 n.39 (1976). *See Public Access to Pretrial Criminal Hearings: The Use of Closure Orders After* Gannett v. De Pasquale, 44 ALBANY L. REV. 455, 481 n.131 (1980).

paper reporting or commenting on any indicted public official's conduct would do so knowing that a trial (in which the newspaper could not directly participate) might decide the matter differently. The public official would then have the considerable advantage of having falsity established in his subsequent libel suit.[9]

Conflicts between a reporter's understanding of facts and a court's determination are commonplace in journalism and often arise simply from the passage of time or the vagaries and limitations of the criminal justice system. Other differences can arise out of the reporter's need to interpret ambiguous legal decisions under short deadlines (*see, e.g., Time, Inc. v. Pape,* 401 U.S. 279 (1971)), or from the differences between the testimony admitted in the controlled courtroom setting, and the evidence available to the journalist. (*See, e.g.,* Graham, *The Secret Trial of John Connally,* The New Republic, June 21, 1975, at 7.) Disregarding these differences and the desirability of providing the public with timely news of current events, the decision below elevates judicial pronouncements to unheard-of heights.

II. The Decision of the Ohio Court Should Be Reviewed Because It Conflicts with Constitutional Determinations of the United States Supreme Court.

A. The Ohio court unconstitutionally creates a conclusive presumption that statements which differ from judicial findings are false.

The decision below unconstitutionally denies your *amici* the protections provided by *New York Times Co. v. Sul-*

---

9. The decision below only discusses the consequences of a publication appearing after a judicial finding has been made. However, logically, a newspaper would be estopped on the issue of truth as readily by a subsequent judicial finding as by a prior one. Only the issue of reckless disregard of the truth might be treated differently.

livan and its progeny by creating a conclusive presumption that unreversed judicial findings are true.[10]

In the series of cases beginning with *New York Times Co. v. Sullivan,* this Court held that a public official or public figure can prevail in a libel action only by proving, *inter alia,* that the allegedly libelous statement is false. *Herbert v. Lando,* 441 U.S. 153, 175-176 (1979), *Garrison v. Louisiana,* 379 U.S. 64, 74 (1964). This limitation on libel actions cannot be circumvented by means of presumptions since " '[t]he power to create presumptions is not a means of escape from constitutional restrictions.' " *New York Times Co. v. Sullivan,* 376 U.S. at 284, quoting *Bailey v. Alabama,* 219 U.S. 219, 239 (1911). Yet, the decision below removes from the critic of judicial findings even the right to intro-

---

10. The court articulated this presumption in the following two passages:

a. "It would appear that, though the press might be at liberty to critcize the judicial process and the results of a given case, unless and until the judgment of the Court is overturned on appeal, the determination of what constitutes the truth has been made. Thus, any news article written either as fact as a news item, or as opinion, that is published knowing that it conflicts with a judicial determination of the truth, may, in our opinion, be regarded as a reckless disregard of the truth so as to constitute 'actual malice' so as to be actionable libel of a public person." Pet., A. 12a.

b. (in affirming the exclusion of the transcript of the wrestlers' injunction hearing [Tr. 734-35] on the ground that only the injunction court's opinion could be considered on the issues raised therein):

"The trial judge [in the injunction action] was the arbiter of the facts. It was his duty to weigh and decide what was determined by the evidence. That determination having been made by that court, its judgment is final unless reversed on appeal. The question of whether the defendants had a justifiable basis for the publication of the 'big lie' article so as to exonerate the defendants from either 'actual malice' or such reckless disregard of the truth as to constitute malice as set forth in Sullivan, must, in our opinion, be predicated on the trial court's decision in that case and not on the evidence elicited therein." Pet., A. 13a-14a.

duce evidence, in a later defamation action, to show that he was right and the court was wrong.

In a sense, the judiciary is set up as an absolute arbiter of truth whose findings may be contradicted only at the extreme peril of the speaker. Such an action smacks of the discredited approach of the Sedition Act of 1798. *See New York Times Co. v. Sullivan,* 376 U.S. at 273-277.

Neither the Constitution nor this Court has ever accorded the judiciary such a powerful role in dictating what opinions the citizens of this country can safely express. Indeed, the presumption has always been to the contrary—that courts, like other branches of government, are fully subject to the "prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. . . ." (Dissent of Judge Cook, Pet., A. 18a, quoting *New York Times Co. v. Sullivan,* 376 U.S. at 269.)[11]

Criticism of the protagonists in our nation's courtrooms has long been upheld even when it has scorched judges for faulty decisions. *See Garrison v. Louisiana,* 379 U.S. at 66 (judges' decision to deny funds for a district attorney probe raises "interesting questions about the racketeer influences on our eight vacation-minded judges"); *Craig v. Harney,* 331 U.S. 367, 369 (1947) (a decision constituted a "travesty on justice"); and *Bridges v. California,* 314 U.S. 252, 276 (1941) (decisions called "outrageous"). Indeed, the

---

11. Although the decision below acknowledges an abstract right to "criticize the judicial process and the results of a given case," Pet., A. 12a, the acknowledgement is empty. The context of the comment makes it clear that the court only concedes such a right where the criticism does not directly reflect on some individual in a defamatory manner. As demonstrated in Section I, *supra,* such a limitation leaves unprotected a great deal of commentary that is vital in a democratic society.

freedom to speak one's mind about the wisdom of the judiciary was recently declared by this Court to be an important First Amendment check against "decisions based on secret bias or partiality", *Richmond Newspapers, Inc. v. Virginia,* slip op. of Mr. Chief Justice Burger at 11-12.

Judicial findings are not to be "confused with absolute truth." Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine,* 9 STAN. L. REV. 281, 315 (1957). On the contrary, the very possibility of judicial error limits the probative value of such findings. This Court has repeatedly declared that the Due Process Clause is violated when a litigant is prevented from disputing the findings of a prior action, unless he had a "full and fair" opportunity to litigate the issues in that previous lawsuit. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 329 (1971), *Parklane Hosiery v. Shore,* 439 U.S. 322, 327 n.7 (1979), *Hansberry v. Lee,* 311 U.S. 32, 40 (1940). This Court should not now allow important First Amendment protections to be eroded by permitting a conclusive presumption of judicial infallibility to choke would-be critics of the courts.

B. The Ohio court unconstitutionally strips critics of judicial findings of their rights to judicial scrutiny of the sufficiency of evidence in libel actions.

The court below ruled that judicial review of evidence in a libel case brought by a public official or public figure should be confined merely to determining whether a reasonable mind would possibly draw *any* inference of actual malice from any of the facts presented. Assignments of Error 2 (Pet., A. 9a) and 6 (Pet., A. 10a), sustained in Pet., A. 13a. Such a constraint plainly contravenes one of the most basic protections afforded by *New*

York Times Co. v. Sullivan—the protection against arbitrary jury verdicts based upon constitutionally insufficient evidence.

The tendencies of juries to punish unpopular opinion alone, *see, Monitor Patriot Co. v. Roy,* 401 U.S. 265, 276-77 (1971), not to mention the complexities of modern libel trials, has persuaded this Court and others of the need for careful judicial scrutiny of the evidentiary adequacy of a libel plaintiff's case. *E.g., Gertz v. Robert Welch, Inc.,* 418 U.S. at 349; *Orr v. Argus-Press Co.,* 586 F.2d 1108, 1114 (6th Cir. 1978), *cert. den.* 440 U.S. 960 (1979). Yet, by its holding that a libel case must be sent to a jury whenever a defendant contradicts a judicial finding, Pet., A. 12a, the decision below automatically sanctions a type and quality of evidence of actual malice insufficient to meet the demanding constitutional standards of "clear and convincing proof" or "convincing clarity" laid down in *Gertz v. Robert Welch, Inc.,* 418 U.S. at 342 and *New York Times Co. v. Sullivan,* 376 U.S. at 285-86, respectively. Pet., A. 17a-18a. The bare fact that a writer was aware of a court decision contrary to his own views constitutes no basis at all for an inference of doubt, especially when coupled with additional evidence, such as brought out in this action, that the writer's opinions were based on his first-hand observations and a telephone interview with an officer of one of the litigants. Pet., A. 17a-18a.[12]

---

12. Not the least disturbing implication of the decision below is its wholly inappropriate incursion into newsgathering. By insisting upon the use of official sources, such as a judicial opinion, the Ohio court attempts to dictate a legally-acceptable standard or methodology for reporting the news. Sportswriter Diadiun's handling of his article under deadline pressure falls comfortably within the conduct of a long line of cases where plaintiffs have been unable to prove "actual malice." *E.g., Associated Press v. Walker,* 388 U.S. 130, 158-59 (1967) (source

(Continued on following page)

Moreover, the decision below deprives the trial court of its mandated role to review the evidence in a libel action to ascertain whether it meets the "clear and convincing" standard. As far back as *New York Times Co. v. Sullivan,* this Court noted the need for courts to make "an independent examination of the evidence to ensure that the proof of actual malice has "the convincing clarity which the constitutional standard demands." *Id.* at 285-86. The duty of a court to make such an examination has been sustained repeatedly since. *Time v. Pape,* 401 U.S. at 284, *Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81, 83 (1967), *St. Amant v. Thompson,* 390 U.S. 727 (1968), *Greenbelt Cooperative Publishing Ass'n v. Bresler,* 398 U.S. 6, 11 (1970).

Footnote continued—
gave every indication of being trustworthy, his information was internally consistent, and his information was consistent with background facts known to defendant); *Vandenburg v. Newsweek, Inc.*, 507 F.2d 1024 (5th Cir. 1975) (reporter relied on previously trustworthy but biased second-hand source without checking with anyone who had participated directly in the events); and *Martin Marietta Corp. v. Evening Star Newspaper*, 417 F. Supp. 947, 959-60 (D.D.C. 1976) (defendant relied on a previously-used source in a "hot news" situation, when defendant knew plaintiff had denied the charges). Nevertheless, the Ohio court's rejection of the subjective standard for actual malice articulated in *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968) and adoption of an objective standard of the reasonably prudent journalist portends judicial second-guessing about the editing of newspapers. *Cf., Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 258 (1974).

CONCLUSION

For the reasons herein stated, as well as for the reasons stated in the Petition for a Writ of Certiorari, your *amici* respectfully request the Court to grant certiorari in this action.

Respectfully submitted,

BRUCE W. SANFORD
818 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 861-1500
Attorney for Amici

APPENDIX

CAHILL GORDON & REINDEL
EIGHTY PINE STREET
NEW YORK, N.Y. 10005

FLOYD ABRAMS
ROGER ANDRUS
JOEL C. BALBAN
HENRY G. BISGAIER
CARL H. BORNMANN
WALTER C. CLIFF
JOSEPH P. CONWAY
MARSHALL COX
THOMAS F. CURNIN
F. ARNOLD DAUM
WILLIAM L. DENNIS
CHARLES F. DEYHLE, JR.
W. LESLIE DUFFY
RAYMOND L. FALLS, JR.
BART FRIEDMAN
CIRO A. GAMBONI
MARVIN S. GOLDBLANG
STEPHEN A. GREENE
EDWARD A. HANSEN
OLIVER W. HAVENS
WILLIAM E. HEGARTY
DAVID R. HYDE
ALLEN S. JOSLYN
IMMANUEL KOHN
WILLIAM T. LIFLAND

O. CARLYSLE McCANDLESS
DENIS McINERNEY
GERARD M. MEISTRELL
RALPH C. MENAPACE, JR.
CLIFFORD L. MICHEL
JOHN P. MITCHELL
MATHIAS E. MONE
DONALD J. MULVIHILL
KENNETH W. ORCE
CHARLES PLATTO
ROY L. REGOZIN
DEAN RINGEL
WILLIAM M. SAYRE
IRWIN SCHNEIDERMAN
H. RICHARD SCHUMACHER
LAURENCE T. SORKIN
LEONARD A. SPIVAK
GERALD S. TANENBAUM
DUDLEY B. TENNEY
MICHAEL P. TIERNEY
ROBERT USADI
JOHN R. VAUGHAN
RALPH O. WINGER
GARY W. WOLF
JOHN R. YOUNG
R. ANTHONY ZEIGER

HUGH P. MORRISON, JR.*
JERROLD G. VAN CISE
COUNSEL

FREDDY DRESSEN**
EUROPEAN COUNSEL

WASHINGTON, D. C. OFFICE
1990 K STREET, N. W.
WASHINGTON, D.C. 20006

EUROPEAN OFFICE
4, PLACE DE LA CONCORDE
75008 PARIS, FRANCE

TELEPHONE 212-838-0100
TELEX 127068
TELECOPIER 212-269-4108

*ADMITTED D.C. ONLY
**ADMITTED FRANCE ONLY

August 12, 1980

Re: Lorain Journal v. Milkovich

Dear Mr. Sanford:

Pursuant to Rule 36 of the Rules of the United States Supreme Court and on behalf of petitioners, The Lorain Journal Company, The News Herald and J. Theodore Diadiun, we hereby consent to your filing of an amicus curiae brief in the case of Lorain Journal Company, et al. v. Michael Milkovich (No. 80-100) which is presently before the Court on petition for a writ of certiorari. I understand that the amicus curiae brief will be filed on behalf of a group of publishers of Ohio newspapers which group includes Dix Newspapers, Inc., Vindicator Printing Company, and a number of others.

Sincerely,

Floyd Abrams

Bruce W. Sanford, Esq.
818 Connecticut Avenue, N.W.
Washington, D.C. 20006